No. 88-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HARTE HANKS COMMUNICATIONS, INC.,
Petitioner,

v.

DANIEL CONNAUGHTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICI CURIAE OF ASSOCIATED PRESS, CABLE NEWS NETWORK, INC., CAPITAL CITIES/ABC, INC., CBS INC., THE CINCINNATI ENQUIRER, CHRONICLE PUBLISHING CO., DOW JONES & COMPANY, INC., GLOBE NEWSPAPER COMPANY, THE HEARST CORPORATION, THE MIAMI HERALD, NATIONAL BROADCASTING COMPANY, INC., NATIONAL PUBLIC RADIO, THE NEW YORK TIMES COMPANY,

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INTEREST OF AMICI CURIAE

This brief is submitted on behalf of twenty-nine amici curiae who include broadcasters, telecasters, journalists, editors, publishers of newspapers and magazines, and associations representing them.* Together, they comprise a broad cross-section of the news media in this country. The amici are more fully described in the Appendix to this brief.

Because the amici, or their members, operate under a constant threat of libel claims, they rely on appellate courts to review independently trial court and jury determinations of actual malice. This independent review is a fundamental part of First Amendment protection. The court below refused to discharge its constitutional duty to review the record independently, disregarding and ultimately misconstruing the meaning of that standard of review.

These amici have a profound interest in this case because they, or those they represent, frequently publish or broadcast news articles and editorials about election campaigns and regularly endorse political candidates. This Court has consistently held that such political speech is entitled to the most exacting degree of First Amendment protection. The ruling of the court below, however, punishes such speech and if not reversed will severely limit comment on political figures and related political issues. The amici, therefore, request that this Court reverse the ruling below and reaffirm fundamental substantive and procedural protection for speech.

SUMMARY OF ARGUMENT

The decision below undermines established First Amendment protections in a case that highlights the importance of those protections for speech about a political campaign and candidates. It disregards the requirement

* Written consent of both parties has been filed with the Clerk of Court pursuant to Rule 36 of the Court.

that appellate courts must engage in *de novo* review of the trial record in order to protect freedom of speech and to ensure that a conclusion of actual malice is not reached without clear and convincing evidence on the record. Instead, the court below presumed findings that are not found on the record and that constitute an impermissible basis for upholding liability.

The court below imposed a penalty on constitutionally protected expression by basing an inference of actual malice on (1) a newspaper's endorsement of a particular political candidate and (2) its presumed competition with another newspaper in the same marketplace. If not overturned, this decision will deter members of the media and others from endorsing political candidates while at the same time speaking openly and vigorously about controversies surrounding a campaign. Such a result violates the First Amendment goal of promoting unfettered political speech. This Court should reverse the decision below and reaffirm these fundamental First Amendment protections.

ARGUMENT

I. SPEECH CONCERNING A POLITICAL CAMPAIGN IS ENTITLED TO THE MOST EXACTING DEGREE OF FIRST AMENDMENT PROTECTION.

This case arose from a newspaper's coverage of a political campaign and its commentary on the actions and qualifications of a candidate for a position on the Municipal Court Bench in Hamilton, Ohio. It illustrates, in microcosm, the nation's political process, which should receive the greatest possible public attention and scrutiny, and highlights the role of the media in both reporting and offering opinions on that process.

The First Amendment vigorously guards the sanctity of public debate on political issues. Political speech is at "the core of the First Amendment," *Brown v. Hartlage*, 456 U.S. 45, 52 (1982), and "is entitled to the most

exacting degree of First Amendment protection," *FCC v. League of Women Voters*, 468 U.S. 364, 375-76 (1984).

Protection of wide-open political debate is necessary to maintain a free marketplace of ideas for democratic self-goverance. It is "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also Stromberg v. California*, 283 U.S. 359, 369 (1931) ("the opportunity for free political discussion" is designed to make government "responsive to the will of the people," which is a "fundamental principle of our Constitution").

This staunch protection of political speech "is to be afforded for 'vigorous advocacy' no less than 'abstract discussion,'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), and it "includes discussions of [political] candidates," *Mills v. Alabama*, 384 U.S. 214, 218 (1966). "[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). It protects equally statements that inspire public confidence in its leaders and those that "include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270. Restrictions on even "insulting" and "outrageous" political speech cannot be tolerated. *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988). If freedom of speech is to be given any meaning, it requires that unpopular political expressions not be punished. *See Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., joined by Brandeis, J., dissenting).

The role of the media in reporting and commenting on political issues and campaigns has a venerable tradition. Historically, a free press has fulfilled "the special and constitutionally recognized role [of] informing and educating the public, offering criticism and providing a forum for decision and debate." *First National Bank v. Bellotti*, 435 U.S. 765, 781 (1985); *see also Thornhill v.*

Alabama, 310 U.S. 88, 101-02 (1940). This traditional role includes both news reporting and editorializing. *Bellotti*, 435 U.S. at 801-02; *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

The editorial role of the media in partisan politics was even more pronounced earlier in this nation's history. Newspapers were established most often as voices of a particular political ideology or party. For example, in the Revolutionary era immediately preceding the adoption of the First Amendment, several newspapers were founded for the primary purpose of supporting or challenging the Crown. Tory newspapers included the *Royal Gazette* (a wartime publication by loyalist, Jeremy Rivington) and Thomas Fleet's *Evening Post*. "Radical" newspapers included the *Independent Advertiser*, whose editor, Samuel Adams, used its pages as a forum for pro-Revolutionary propaganda. *See generally* L. Levy, *Emergence of a Free Press* (1985). This promotion of partisan politics continued into the 19th century with the appearance of labor newspapers such as the *Mechanic's Free Press*, whose self-appointed function was to counteract prejudice against the laborer. Such newspapers eventually led to the formation of the first national labor organizations. E. Emery, *The Press in America*, at 113 (4th ed. 1978). In the 1830s, William Lloyd Garrison began his abolitionist publication, the *Liberator*, in opposition to the proponents and institutions of slavery. That editorial tradition was carried on in the 1850s on a far larger scale by the *New York Tribune*, whose editor, Horace Greeley, used it as a platform to promote a newly organized political party that brought Abraham Lincoln to the presidency. While Lincoln held office, the 17 New York daily newspapers were polarized according to their support or opposition for the president. *See* Emery, *supra*, at 166.[1]

[1] Similarly, the prominent editors of the late 19th and early 20th centuries, such as Joseph Pulitzer, William Randolph Hearst, and

This case exemplifies the historical participation by the press in the political process. Two newspapers endorsed competing candidates and espoused different views of their relative qualifications. The campaign was bitterly contested and included allegations by Connaughton, the respondent, that his opponent (endorsed by the *Journal News*) was corrupt.[2] The *Journal News* investigated Connaughton's sources for those allegations and published those sources' statements, the challenged portions of which Connaughton himself confirmed in an interview with the *Journal News* before publication.

In upholding a jury award against the *Journal News* for $5,000 compensatory and $195,000 punitive damages, the court below committed two fundamental errors, both of which deprived the speech in question of the protection to which it is entitled under the First Amendment. First, the court did not independently review the factual record on the issue of actual malice. Instead, it deferred to manufactured jury findings and inferences of actual malice that appear nowhere on the record. Second, it found evidence of actual malice in constitutionally pro-

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Edward Wyllis Scripps, used their expanding influence in the popular press to promote their own political ideologies. *See generally* E. Emery, *The Press in America*, *supra*; E. Ford & E. Emery, *Highlights in the History of the American Press* (1954); F. Mott, *American Journalism* (rev. ed. 1950).

This Court has recognized the "prominent role" of the political cartoon historically in promoting public debate about political candidates. *Hustler Magazine, Inc. v. Falwell*, 108 Sup. Ct. 876 (1988) (noting that "our political discourse would have been considerably poorer without them"). The editorial role of the press through the written or spoken word is no less prominent or necessary in the political process and is entitled to as much protection under the First Amendment. *See generally* McCombs, *Editorial Endorsements: A Study of Influence*, 44 Journalism Q. 545 (1967).

[2] Hereinafter, the respondent will be referred to as Connaughton and the petitioner, Harte-Hanks Communications, Inc., will be referred to by the name of its publication, the *Journal News*.

tected activities: the *Journal News'* endorsement of a political candidate and presumed competition in the news marketplace.

II. THE FIRST AMENDMENT REQUIRES INDEPENDENT APPELLATE REVIEW AS AN ESSENTIAL PROTECTION FOR SPEECH.

A. Independent Review Is Necessary to Ensure that First Amendment Protections Are Properly Applied and Maintained.

This Court has required independent appellate review of the factual record whenever a trier of fact determines that a libel defendant acted with actual malice in making statements about a public figure. *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-511 (1984). That requirement is consistent with a long line of cases in which this Court has imposed the independent review standard to a variety of constitutional contexts, most of which have involved political speech. Both of these constitutional concerns, protection of speech concerning a public figure and protection of political speech, are united in this case.

1. *Independent Review Has Consistently Been Required to Protect Political Speech.*

That appellate courts must independently review the factual record to protect constitutional rights has long been part of this Court's jurisprudence. This Court has most often required independent review of the record to protect First Amendment rights.[3] *See, e.g., Connick v.*

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[3] Preservation of other constitutional rights has also prompted independent review. For example, in *Norris v. Alabama*, this Court stated it would "fail of its purpose in safeguarding constitutional rights" if it did not independently review the factual record to determine whether a state had systematically excluded blacks from its juries in violation of the Fourteenth Amendment's Equal Protection Clause, 294 U.S. 587, 590 (1935). This Court has held that

Myers, 461 U.S. 138, 147-48 & n.7, 150 n.10 (1983) (whether employee's speech involved a matter of public concern in wrongful termination action); *Jenkins v. Georgia*, 418 U.S. 153, 180 (1974) (to determine if material is obscene); *Miller v. California*, 413 U.S. 15, 25 (1973) (same). The majority of these First Amendment cases have involved political speech. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915-16 & n.50 (1982) (whether political boycott of white merchants was protected by the First Amendment); *Street v. New York*, 394 U.S. 576, 589-90 (1969) (whether disparagement of the flag was protected by the First Amendment); *Cox v. Louisiana*, 379 U.S. 536, 545-48 (1965) (whether political demonstration was protected by the First Amendment); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (whether two publications constituted "clear and present danger . . . to the administration of justice by the court"). In all these cases, the Court stated it was duty-bound to determine the issue only after an independent review of the factual record.

Independent appellate review is required in such cases for at least two reasons: (1) to ensure that First Amendment protection is afforded to unpopular speakers and points of view, *see, e.g., NAACP v. Claiborne*, 458 U.S. at 910-11 (even when "offensive" speech is intended to be "coercive"); *Monitor Patriot Co. v. Roy*, 401 U.S. at 277, and (2) to ensure that First Amendment principles maintain their integrity when applied to diverse factual situations by juries and trial courts, *see, e.g., Pennekamp v. Florida*, 328 U.S. at 324.

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appellate courts have a "responsibility" they "cannot escape" to review the voluntariness of confessions to protect criminal Due Process rights under the Constitution. *Spano v. New York*, 360 U.S. 315, 316 (1959); *Brooks v. Florida*, 389 U.S. 413, 415 (1967); *Haynes v. Washington*, 373 U.S. 503, 522 (1963). *Cf. Rios v. United States*, 364 U.S. 253, 255 (1960) (claim of unconstitutional search and seizure requires the Court to conduct a "particularized evaluation of the conduct of the officers involved").

2. *Independent Review Is Necessary to Ensure Proper Application of the Actual Malice Standard in Defamation Cases.*

In *New York Times*, 376 U.S. 254, this Court first announced that the First Amendment requires public officials to prove actual malice by clear and convincing evidence. The Court also immediately applied the independent review standard to ensure that a jury finding of actual malice "does not constitute a forbidden intrusion on the field of free expression." *Id.* at 285.

The application of independent review to cases involving actual malice was subsequently reaffirmed in *Bose*, 466 U.S. at 508. The Court articulated the same reasons for the rule that arose in the context of political speech. The Court explained that a jury's application of First Amendment principles "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks . . .' which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Bose*, 466 U.S. at 510 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. at 277 and *New York Times*, 376 U.S. at 270).[4] As one court has noted, "[t]he evidence is mount-

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[4] This same concern arises in the context of jury awards for punitive damages in defamation cases. Disproportionately large punitive awards are beginning to dominate these cases and demonstrate that damages may be used to punish the media for unpopular viewpoints, not false statements. The case before this Court now is illustrative. The $195,000 punitive damages award is totally out of proportion to the minimal $5,000 compensatory award. Nearly 60% of libel damages awards during the period between 1980 and 1984 included an award for punitive damages. *See Libel Def. Resource Center Bull. No. 11*, at 14-15 (Nov. 15, 1984). Punitive damages during that period amounted to 80% of the total damages awarded. *Id.*

Moreover, as Justice Douglas suggested in his dissent in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the influence of emotion

ing that juries do not give adequate attention to limits imposed by the First Amendment and are much more likely than judges to find for the plaintiff in a defamation case." *Ollman v. Evans*, 750 F.2d 970, 1006, 1037 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).[5]

Independent appellate review is demanded to ensure the "precision of regulation" required by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 916. The importance of the First Amendment rights at stake in each individual case justifies independent review. "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the threshold that bars the entry of *any judgment* that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511 (emphasis added).

Independent appellate review is also mandated because the application of the actual malice test to factual situations "is the process through which the rule itself evolves and maintains its integrity." *Bose*, 466 U.S. at 503. The importance of this task requires the guidance of appellate courts through independent review of the record.

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and prejudice is not confined to the jury. *See also* Van Alstyne, *First Amendment Limitations on Recovery from the Press*, 25 Wm. & Mary L. Rev., 793, 801, 808 (1984) (libel awards may rest in part on "localized judicial distaste for certain publishers" and on judges' "understandable, but constitutionally improper, distaste for the defendant's publication").

[5] *See Libel Def. Resource Center Bull. No. 21*, at 2, 5 (Oct. 31, 1987); *Libel Def. Resource Center Bull. No. 16*, at 2 (March 15, 1986) (high rate of public official libel plaintiffs prevailing before jury). *See Libel Def. Resource Center Bull. No. 16*, at 2; *see also Libel Def. Resource Center Bull. No. 7*, at 1, 21 (July 15, 1983) (a 1983 study revealed that 41 out of 51 appeals by libel defendants where independent review applied resulted in reversal or modification of the verdict); *Libel Defense Resource Center Bull. No. 23* at Table 3B (Oct. 31, 1988) (a subsequent 1988 study revealed that 35 out of 46 such appeals resulted in reversal or modification).

B. Independent Appellate Review Requires *De Novo* Review of All Relevant Portions of the Factual Record, Not Deferential Review of Presumed Jury Findings and Inferences.

1. *Both this Court and Other Appellate Courts Have Reviewed All Record Evidence* De Novo.

This Court held in *New York Times*, 376 U.S. at 284-86, and reaffirmed in *Bose*, 466 U.S. at 498-511, that appellate courts are required by the First Amendment to conduct an independent, *de novo* review of the entire record when a fact finder determines that a libel defendant has acted with actual malice. This independent review is expressly distinguished from the traditional Rule 52(a) "clearly erroneous" review that grants deference to the findings and inferences of a trial court or jury. *Bose*, 466 U.S. 501, 514.

New York Times defined the scope of such independent review to include all record evidence relating to the jury's finding of actual malice:

> [T]he rule is that we "examine for ourselves the statements in issue and circumstances under which they were made . . ." We must "make an independent review of the whole record" . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

New York Times, 376 U.S. at 285 (citations omitted).[6]

Many lower courts have not hesitated to apply independent review by examining the record evidence *de novo*. *See, e.g., Koch v. Goldway*, 817 F.2d 507, 508-09 (9th Cir. 1987) (*de novo* review of whether political statement was protected opinion), *Herbert v. Lando*, 781 F.2d 298, 308 (2d Cir.) *cert. denied*, 476 U.S. 1182 (1986)

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[6] *Bose* reiterated the *New York Times* standard in reviewing the findings of a trial judge, 466 U.S. at 508, and emphasized that independent review means "*de novo* review." *Id.* at n.27.

(*de novo* review of actual malice); *Mr. Chow v. Ste. Jour Azur, S.A.*, 759 F.2d 219, 230 (2d Cir. 1985) (same); *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072, 1088-90 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) (same); *Brasslett v. Cota*, 761 F.2d 827, 839-40 (1st Cir. 1985) (same); *McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986), *cert. denied*, 107 S. Ct. 1983 (1987) (same); *cf. Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir) (en banc), *cert. denied*, 108 S. Ct. 200 (1987) (at a minimum, independent review of an inference of actual malice is "far more rigorous[] than ordinary judgment n.o.v. standard").

Nevertheless, the court below either misunderstood or misconstrued *Bose*.[7] Yet *Bose* did not create the independent review standard; it had been applied unwaveringly by this Court prior to *Bose*. *Bose* and the long line of precedent that *Bose* expressly relied on[8] unequivocally hold that independent appellate review means *de novo* review of all relevant portions of the factual record, not deferential review of the jury's findings and inferences.

In *Bose*, the Court reviewed the record evidence to evaluate the trial court's inference of actual malice. 466 U.S. at 493-98, 511-13. The Court noted that the trial judge based his conclusion of actual malice on his disbelief of a defense witness. *Id.* at 512. But the Court determined for itself that the record otherwise contained

[7] For a discussion of the misapplication of *Bose* by the court below, see Part II.B.2, *infra*.

[8] In discussing the independent review standard, the *Bose* Court expressly relied on *Roth v. United States*, 354 U.S. 476 (1957); *New York v. Ferber*, 458 U.S. 747 (1982); *Street v. New York*, 394 U.S. 576 (1969); *Hess v. Indiana*, 414 U.S. 105 (1973); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Miller v. California*, 413 U.S. 15 (1973); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time Inc. v. Pape*, 401 U.S. 265 (1971). *See Bose*, 466 U.S. at 504-511.

insufficient evidence to infer actual malice and held that the trial judge's disbelief of the witness was not clear and convincing proof of actual malice. *Id.*

The *New York Times* Court reviewed the factual record and determined that the Alabama Supreme Court's inference that the *Times* acted with "cavalier ignorance of the falsity of the advertisement" was not warranted. 376 U.S. at 285-86. The Court also concluded that "there was no evidence to impeach the [defense] witness' good faith . . . ." *Id.* at 286.[9]

Earlier applications of the independent review standard by this Court in other contexts similarly involved a *de novo* review of the record. For example, in *Norris v. Alabama*, the Court evaluated for itself demographic data and historical facts, weighed contested testimony, rejected the fact finder's inferences drawn from that testimony, 294 U.S. at 590-92, and did not credit what it felt was unpersuasive testimony relied on by the trial court, *id.* at 598.

In *Cox v. Louisiana*, the Court independently analyzed the record testimony, 379 U.S. at 546-48 & n.12, characterized portions of it as "extravagant," *id.* at 546 n.9, viewed for itself a television news film of the event in issue, *id.* at 547, and rejected the trial court's characterization of, and inferences drawn from, that evidence, *id.* at 549-50.[10]

[9] In stark contrast, the court below merely assumed that the defense witnesses' credibility was impeached without any record evidence to support that inference. *See* notes 13 and 14 and accompanying text, *infra*.

[10] Examples of other First Amendment cases in which the Court similarly reviewed the record *de novo* include *NAACP v. Claiborne Hardware*, 458 U.S. 886 (whether conduct in politically motivated boycott was protected by the First Amendment); *Jenkins v. Georgia*, 418 U.S. 153 (whether material in film was obscene); *Street v. New York*, 394 U.S. 576 (whether conduct and words supported

These cases demonstrate a consistent commitment by this Court to conduct a *de novo* review of the entire record whenever the constitution requires application of the independent review standard.

2. *The Court Below Reversed the* Bose *Standard and Deferred to Presumed Findings Not Found in the Record.*

It is not enough for appellate courts to acknowledge their duty to provide an independent review of actual malice, but then to misconstrue that standard and defer to presumed jury findings and inferences found nowhere in the record. The court below claimed that it was "[m]indful of the dictates of *Bose Corp.*," but then proceeded "to determine if the *jury's findings* were *clearly erroneous.*"[11] App. at 4a (emphasis added); *see also* App. at 19a-20a n.5, 30a, 37a.[12]

But the sum total of the jury's findings on the record consisted only of an affirmative response to three questions asking whether the contested statements were (1) defamatory, (2) false and (3) published with actual malice. App. at 89a. From this slender reed the court

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conviction for disparagement of the flag); and *Pennekamp v. Florida*, 328 U.S. 331 (whether two newspaper articles constituted clear and present danger to administration of justice).

[11] The court below also made a distinction between "ultimate" findings of actual malice and "subsidiary" facts, stating that independent review applies only to the former. App. at 31a-33a. The *Bose* Court, however, mentioned those two categories of fact only in the context of a discussion of the historical distinction between issues of law, of fact and of mixed law and fact. *Bose*, 466 U.S. at 500 n.16, 501. When the Court addressed whether it should review a finding of actual malice *de novo*, its affirmative answer was based on the constitutional nature of the issue, not on a fact/law distinction. *Id.* at 508. The Court was most clear that independent review requires examination of the "whole record" and the Court, indeed, conducted such a review of both "factual" and "legal" issues. *Id.*

[12] References to the Sixth Circuit's decision are to the Petition.

below manufactured findings and inferences the jury "could have" made concerning (1) the *Journal News*' endorsement of Connaughton's opponent, (2) the *Journal News*' alleged competition with another newspaper that endorsed Connaughton and (3) the *Journal News*' supposed failure to investigate and bias in publishing the article. App. at 35a-36a.

The court below also presumed that the jury "simply did not believe the defendants' [sic] witnesses, its evidentiary presentations or its arguments." App. at 27a-28a. It thus cast the entire jury verdict as turning on a supposed credibility determination by the jury that does not appear in the record.[13] The court apparently took this conclusion as license to ignore critical aspects of the record including, most significantly, Connaughton's confirmation of the article in a tape-recorded, prepublication interview with the *Journal News*.[14] The court below also frankly admitted its rejection of other critical evidence:

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[13] The Sixth Circuit stated that this entire case was one whose "core issue was simply one of credibility to be attached to the witnesses . . . ." App. 27a. This is yet another manufactured "finding" imputed to the jury that nowhere appears in the record. As the dissent pointed out, the factual testimony at trial was largely undisputed. App. at 62a. Thus, it cannot be that the determination of actual malice in this case was simply a matter of witness credibility. Rather, it turned on which facts the jury credited as evidence of actual malice and the inferences it drew from those facts. *Bose* requires appellate courts to review the record independently to see if the facts support a finding of actual malice. The Sixth Circuit simply refused that duty.

Moreover, the assessment of the court below as to credibility is a purely circular argument, to the effect that (1) the jury found for the plaintiff, (2) therefore, the jury must not have believed the defendant and (3) therefore, the finding for the plaintiff is a matter of witness credibility and cannot be disturbed.

[14] In discussing the tape-recorded statements of Connaughton, the Sixth Circuit stated:

> The instant case affords the perfect vehicle for reflecting the implementation of . . . Rule 52(a) in assigning deference to a

> If the jury had credited the defendants' [sic] evidence, it would have concluded that the *Journal* was not motivated to publish the . . . article by a desire to promote Dolan as its candidate for the Hamilton Municipal Court judgeship by discrediting Connaughton and thereby indirectly discrediting the *Enquirer* for competitive reasons. It could have easily concluded that Thompson's charges were true and/or that the *Journal's* conduct in determining Thompson's credibility was not a highly unreasonable departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers.

App. at 28a-29a.

Bose states that appellate courts are "permitted" to give "due regard" to the fact finder's determination of witness credibility. 466 U.S. at 499-500. The court below took this to mean that the jury members are the "ultimate fact finders" on witness credibility, whose inference of actual malice drawn from that determination is apparently beyond review of the appellate courts. App. at 27a.

That conclusion is inconsistent with the record in this case and with decisions of this Court. First, as has been shown, this case does not turn on a jury determination of witness credibility.[15] That was a finding presumed by the Sixth Circuit, not a finding by the jury on the record.

Second, even if the jury had made a credibility determination, the independent review standard requires an

> jury's findings of fact . . . . The jury refused to believe the theory of the defense and the testimony of its witnesses. The majority, in its decision, has refrained from invading the province of the fact finder by substituting its interpretations of the testimony in evidence of either party.

App. at 19a-20a n.5.

[15] *See* note 13 and accompanying text, *supra*.

appellate court to examine the whole record and review the inferences drawn from that credibility determination and other evidence to see if together they amount to clear and convincing proof of actual malice. As shown above, that is precisely what this Court did in *Bose* in determining that the trial court's credibility determination did not support a conclusion of actual malice by clear and convincing evidence. *Bose*, 466 U.S. at 511-13; *see also New York Times*, 376 U.S. at 285-86.[16]

The phrase "due regard," to have any meaning in the context of *Bose*, must be read in its normal and literal sense. Appellate courts should give whatever regard is "due" to the inferences of actual malice drawn from the jury's credibility determinations (if apparent from the record at all) *in light of* the reviewing court's independent assessment of the entire record. If those inferences are inconsistent with the record evidence, or insufficient to establish actual malice, they should be rejected, just as this Court did in *New York Times* and *Bose*.

III. A CONCLUSION OF ACTUAL MALICE CANNOT BE BASED ON ACTIVITIES PROTECTED BY THE FIRST AMENDMENT.

A. The Media's Political Endorsements and Competition in the Marketplace Are Constitutionally Protected Activities, Not Bases for a Finding of Actual Malice.

The court below noted that the *Journal News* had endorsed Connaughton's political rival (Judge Dolan) six years prior to the publication of the challenged article, when Dolan first ran for office, and again two days before the election (*after* the challenged article was published). App. at 5a, 21a. The court also emphasized that another daily newspaper (the *Cincinnati Enquirer*) promoted the candidacy of Connaughton. App. at 15a. From these facts, the Sixth Circuit imputed to the jury the

[16] *See* notes 8-10 and accompanying text, *supra*.

finding that the *Journal News* "desire[d] to promote Dolan as its candidate . . . by discrediting Connaughton and thereby indirectly discrediting the *Enquirer* for competitive reasons." App. at 27a; *see also* App. at 12a-13a.[17] These two factors, the editorial position of the *Journal News* and its presumed competition with the *Enquirer*, formed the linchpin of the Sixth Circuit's affirmation of the jury's finding of actual malice.[18]

When competition of opinions and ideas occurs between members of the media, however, it does not diminish the rule that opinions are protected by the First Amendment. Such competition between members of the media, instead, serves the First Amendment goal of securing " 'the widest possible dissemination of information from diverse and antagonistic sources.' " *New York Times*, 376 U.S.

[17] The court stated that the jury "could have concluded" that the *Journal News* was "singularly biased in favor of Dolan and prejudiced against Connaughton" because of the "favorable editorial and daily news coverage received by Dolan from the Journal as compared with the equally consistently unfavorable news coverage afforded Connaughton . . . ." App. at 35a. The jury also "could have concluded" that the *Journal News* and the *Enquirer* were engaged in a "bitter rivalry . . . . for domination of the greater Hamilton circulation market . . .," App. at 35a, "that by discrediting Connaughton, the *Journal* was effectively impugning the *Enquirer* thereby undermining its market share of the Hamilton area," App. at 35a, and that the *Journal News* sought "to maximize the effect of its campaign to discredit Connaughton and the *Enquirer*," App. at 36a. The Court then deferred to these manufactured "findings" as "not clearly erroneous" and upheld the jury's conclusion that the *Journal News* acted with actual malice.

[18] In developing this theme, which occupied most of the majority opinion, the court failed to examine the challenged language in the allegedly defamatory article or to establish that the *Journal News* published those statements with the requisite subjective awareness that they were false. *See, e.g., New York Times*, 376 U.S. at 271-72; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). For a discussion of the subjective standard imposed by the actual malice rule, see Part III.B, *infra*.

at 266 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

Under the First Amendment, the remedy for bad or unpopular opinions is the unfettered opportunity to dissent, not lawsuits to punish those opinions. "The First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' " *New York Times*, 376 U.S. at 270 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Learned Hand, J.)). " '[T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and . . . the fitting remedy for evil counsels is good ones [not] . . . coerce[ion] by law—the argument of force in its worst form.' " *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

Unless reversed, the court's deference to a presumed inference of actual malice based on a newspaper's editorial position necessarily will deter members of the media from publishing timely, controversial news stories that relate to a political race on which they have taken a stand.[19] Either they must refrain from reporting on such campaigns or must withhold their endorsements. Either

[19] Opinion, of course, is constitutionally protected from legal attack in a defamation action. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the *competition of other ideas*." *Gertz*, 418 U.S. at 339-40 (emphasis added); *see also Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876 (1988) (even outrageous statements of opinion are privileged); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 534 (1980) (" 'The best test of truth is the power of thought to get itself accepted in the competition of the market' ") (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

result is contrary to the role of the press under the First Amendment and produces a presumption of actual malice whenever the press both reports and comments on a political campaign.

Likewise, the speculative assumption that a newspaper's political opinion or reporting may have some commercial value in promoting newspaper sales in no way diminishes the political nature of that commentary or reduces the protection afforded by the First Amendment. In rejecting the notion that a political advertisement in a newspaper was entitled to less protection than other political speech because of its commercial value, this Court stated: "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." *New York Times*, 376 U.S. at 266.[20] Also, whether a story is published under competitive pressure to produce hard-hitting investigative reports is irrelevant to a determination of whether a statement was published with serious doubts about its truth. *Tavoulareas*, 817 F.2d at 796-97 & n.50 ("the First Amendment forbids penalizing the press for encouraging its reporters to expose wrongdoing by . . . public figures").

By basing its conclusion of actual malice on a newspaper's desire to increase its circulation, the Sixth Circuit essentially created a dangerous presumption of actual malice whenever a member of the media is a defendant in a defamation action because the media unavoidably operate in a competitive marketplace. Thus,

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[20] This was reaffirmed in the context of obscenity cases when this Court held that granting *any* weight to the fact that a publication is sold for profit would "offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg v. United States*, 383 U.S. 463, 474 (1966). *See also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975).

the Sixth Circuit's ruling significantly undermines the requirement imposed by *New York Times* that plaintiffs prove actual malice by clear and convincing evidence when a media defendant is named.

Even more troubling, a determination of actual malice based on an endorsement of a particular political candidate operates as a content-based restriction on political speech that in effect violates the First Amendment principle of viewpoint neutrality. *E.g.*, *Boos v. Barry*, 108 S. Ct. 1157 (1988); *see also Bose*, 466 U.S. at 505 (one of the primary goals of independent review by appellate courts is to *preserve* the "principle of viewpoint neutrality that underlies the First Amendment"); *City of Lakewood v. Plain Dealer Publishing Co.*, 107 S. Ct. 1345 (1988) (a state cannot employ content- or viewpoint-specific criteria in restricting speech). The decision below is content-based because it upholds a finding of actual malice based on the editorial stance of the *Journal News* and its endorsement of a political candidate. Thus, the court below either preserved a content-based penalty on political speech imposed by the jury, or worse, it imposed such a penalty itself by *manufacturing* a jury finding to that effect and upholding liability on that basis.[21]

The amici respectfully request the Court to exercise its own independent review in this case as part of "the process through which the [actual malice] rule . . . evolves and its integrity is maintained," *Bose*, 466 U.S. at 503, and to establish a rule that actual malice may not be presumed from endorsement of a political candidate, nor may it be presumed from competition between members of the media.

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[21] That penalty was exacerbated by a punitive damages award of $195,000, which was 39 times the size of the minimal compensatory award.

B. Allegations of Common Law Malice or Failure to Meet Journalistic Standards Are Insufficient to Support a Finding of Actual Malice.

The primary finding the Sixth Circuit imputed to the jury was "that the *Journal* was singularly biased in favor of Dolan and prejudiced against Connaughton." App. at 35a; *see also* App. at 13a, 15a. But by allowing the *Journal News*' endorsement of Dolan to give rise to an inference of actual malice, the court below confused common law malice with the actual malice requirement of *New York Times*.

The court below also failed to recognize that a political endorsement does not necessarily reflect enmity toward the other candidate; neither does it preclude professionalism in reporting.

> [A]n adversarial stance is fully consistent with professional, investigative reporting. It would be sadly ironic for judges in our adversarial system to conclude . . . that the mere taking of an adversarial stance is antithetical to the truthful presentation of the facts. We decline to take such a remarkable step in First Amendment jurisprudence.

Tavoulareas, 817 F.2d at 795.[22]

The actual malice rule requires a finding by clear and convincing evidence that the allegedly defamatory words were published with serious doubts about their truth. *E.g., St. Amant*, 390 U.S. at 731. Common law malice,

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[22] In fact, the *Journal News* was guarded in its endorsement of Dolan and did not attack Connaughton. As it stated in its editorial:

> [T]he *Journal News* has taken extra time to examine the candidates, weigh the charges and innuendoes and consider the opinions of those who have worked with both candidates. The findings are inconclusive . . . . [A] slight edge goes to Judge James M. Dolan—with the admonition that, if elected, he must assume the responsibility for restoring public confidence in the administration of the court.

J.A. 253, Def. Exh. H.

which includes hatred, spite, ill-will, hostility or deliberate intention to harm, is a constitutionally impermissible basis for establishing actual malice. *Old Dominion No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 281-82 (1974); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 9-11 (1970); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974); *see also Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. at 881 (First Amendment prohibits finding actual malice on the basis of "bad motive"). In *Greenbelt Coop. Publishing Ass'n*, a jury finding of liability was reversed as constitutionally deficient because "the jury [was] permitted to find liability merely on the basis of a combination of falsehood and general hostility . . ." and because the general verdict made it "'impossible to know . . .' whether the jury imposed liability on a permissible or an impermissible ground." 398 U.S. at 10-11 & nn.2-3.

The Sixth Circuit did not even address the words of the challenged publication in this case. Instead, it focused on an earlier article published by the *Journal News* and the *Journal News*' endorsement of Dolan to establish bias.[23] It is wrong for a fact finder to infer actual malice from common law malice presumed from the challenged speech. It is even worse for such an inference to be based on other editorial speech not even alleged to be defamatory.

The court's assertion that the *Journal News* failed to investigate the accuracy of the alleged defamatory state-

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[23] In fact, the court chose to attach as an appendix to its opinion that earlier article rather than the challenged article, and not once quoted the challenged language. App. at 45a-49a. The dissent, however, did attach the challenged article and systematically analyzed each challenged statement in light of Connaughton's prepublication admissions to the *Journal News*. App. at 49a-58a. The dissent concluded that those admissions demanded reversal even under the deferential Rule 52(a) standard of review espoused by the majority. App. at 50a.

ment also is an impermissible basis for inferring actual malice. First, failure to investigate is constitutionally insufficient to establish actual malice by clear and convincing evidence. *St. Amant*, 390 U.S. at 730-33. Second, Connaughton's own prepublication confirmation of the article's challenged statements (a portion of the record the Sixth Circuit failed adequately to consider, *see* Part II.B.2, *supra*) belies any claim of failure to investigate.

The Sixth Circuit's opinion may also be read as an attempt to resurrect the objective "reasonable publisher" standard once proposed by a plurality of the Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) (Harlan, J.,). That standard was originally suggested only for "public figure" plaintiffs, not "public official" plaintiffs. *Id.* Moreover, a majority of the justices in *Butts* favored the subjective *New York Times* standard for both types of plaintiffs, *id.* at 162, 170, 172-73, and that *New York Times* standard was subsequently reaffirmed by the Court in *Gertz*, 418 U.S. at 335-36.

The court below could point to no constitutionally sufficient evidence to support a finding of actual malice. In fact, Connaughton's prepublication admissions preclude a finding of either actual malice or falsity. Instead, the court's decision amounts to punishment of constitutionally protected expression.

CONCLUSION

This case demonstrates the necessity for both aspects of the *New York Times* rule: procedural protection in the form of independent appellate review and substantive protection to limit the kinds of evidence that can support a conclusion of actual malice. The amici ask the Court to affirm that independent review under *Bose* requires *de novo* review of all record evidence relevant to a finding of actual malice, and at a minimum prohibits deferring to manufactured "findings" favorable to the plaintiff. The amici also ask the Court to establish a rule that a finding of actual malice may not be predicated on a defendant's editorial positions and/or political endorsements, or on competition between members of the media.

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APPENDIX

APPENDIX

IDENTITY OF INDIVIDUAL AMICI

The Associated Press ("AP"), the world's largest news gathering organization, is a mutual news cooperative organized under the Not-For-Profit Corporation Law of the State of New York. AP engages in gathering and distribution of news of local, national and international importance to its member newspapers and broadcast stations across the United States and throughout the world. The AP, on its own behalf and on behalf of its members, has a vital interest in protecting the right of the press to gather and publish news.

Cable News Network, Inc. provides the nation with two 24-hour television news services, CNN and Headline News. Its news and information programming reaches more than 48 million households in the United States. Its programming is also carried in 65 other countries.

Capital Cities/ABC, Inc., through subsidiaries, owns and operates television and radio broadcasting stations and national television and radio networks; it also publishes newspapers, magazines, and books.

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

The Cincinnati Enquirer is a daily newspaper published in Cincinnati, Ohio as a division of Gannett Satellite Information Network, Inc., with daily circulation of 194,804 and Sunday circulation of 328,378.

The Chronicle Publishing Co. publishes the *San Francisco Chronicle* with a daily circulation of 565,000 and a Sunday circulation of 730,000. The Chronicle Broadcasting Company, a division of Chronicle Publishing Company, also operates three television stations.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's National Business and Financial Weekly*, The Dow Jones News Service, and a number of other publications. Through its Ottaway Newspapers, Inc. subsidiary it publishes newspapers in 23 communities in 13 states across the nation.

Globe Newspaper Company publishes *The Boston Globe*, a daily newspaper in Boston which has the largest circulation in New England, with a daily circulation of approximately 500,000 and a Sunday circulation of approximately 800,000.

The Hearst Corporation is a diversified privately-held company which is engaged in a broad spectrum of commercial activities including communications. It publishes nationally distributed magazines, newspapers and hardcover and soft-cover books, and it owns and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

Miami Herald Publishing Company is an unincorporated division of Knight-Ridder, Inc., which publishes the *Miami Herald*, a newspaper of daily circulation throughout south Florida.

National Broadcasting Company, Inc. owns and operates a national television network, and itself and through subsidiaries operates television stations, all of which are engaged in the gathering and dissemination of news to the public.

National Public Radio is a non-profit membership organization providing news and information and cultural programming including Morning Edition and All Things Considered to over 350 member stations.

The New York Times Company publishes numerous magazines and newspapers, including *The New York Times*, a daily newspaper with nationwide circulation, and some 35 regional newspapers; it also owns radio and television properties. *The New York Times* has a daily

circulation of 1.1 million and a Sunday circulation of over 1.6 million.

The Philadelphia Inquirer is a newspaper published daily by Philadelphia Newspapers, Inc. in Philadelphia, Pennsylvania, with a daily circulation of 502,507 and a Sunday circulation of 989,026 in the greater Philadelphia metropolitan area.

Seattle Times Company publishes *The Seattle Times*, the largest total daily and Sunday circulation newspaper in the Pacific Northwest, and also publishes the *Walla Walla Union-Bulletin*.

Time Inc. is the largest publisher of general circulation magazines in the United States. It publishes and distributes *Time* magazine, *Fortune*, *Sports Illustrated*, *People*, *Money*, *Life*, and, through its subsidiary, Southern Progress Corporation, also publishes *Southern Living* and *Southern Accent* magazines. *Time* magazine alone has a domestic circulation of 4.3 million.

The Times Mirror Company publishes the *Los Angeles Times*, a newspaper with a circulation of more than 1,137,000 daily and more than 1.4 million on Sunday. Times Mirror also publishes seven other newspapers including *Newsday*, the *Baltimore Sun*, and *The Hartford Courant*, with a combined Sunday circulation of more than two million copies.

Tribune Company is a communications company owning *The Chicago Tribune*, *The New York Daily News*, the *Orlando Sentinel*, the *Fort Lauderdale News and Sun-Sentinel*, the *Escondido (CA.) Times-Advocate*, the *Palo Alto Times-Tribune*, the *Newport News, Virginia Daily Press* and *The Times-Herald*, and television stations in Chicago, New York, Los Angeles, Denver, Atlanta and New Orleans.

The American Civil Liberties Union is a nationwide, non-partisan, membership organization dedicated to de-

fending the principles embodied in the Bill of Rights. Since its founding nearly 70 years ago, the ACLU has been particularly concerned with government action—whether administrative, legislative, or judicial—that restricts the free flow of information contemplated by the First Amendment. Accordingly, the ACLU has participated in many of this Court's major First Amendment cases and has supported the effort, begun in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to place constitutional limits on the common law of libel.

The American Newspaper Publishers Association ("ANPA") is a national trade association representing over 1,400 newspapers located primarily in the United States and Canada. Its membership constitutes approximately 90% of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

The American Society of Newspaper Editors is a nationwide professional organization of more than 1,000 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society include the ongoing responsibility to improve the manner in which the journalism profession carries out its obligations to providing an unfettered and effective press in the service of the American people.

The Association of American Editorial Cartoonists ("AAEC") is a non-profit organization of over 300 professional editorial cartoonists in the United States, Canada and Mexico. Founded in 1957 by John Stampone, editorial cartoonist for the *Army Times*, AAEC's purpose is to promote and stimulate public interest in the editorial cartooning profession, defend the rights of cartoonists, sponsor exhibitions and help aspiring cartoonists.

The National Association of Broadcasters, organized in 1922, is a nonprofit incorporated trade association

comprised of more than 5,000 radio stations, 970 television stations, and the major commercial broadcasting networks. NAB's members cover, produce, and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

The National Conference of Editorial Writers is a nationwide professional association of editorial writers representing about 400 daily newspapers, organized to advance professionalism in, and to encourage the free expression of, editorial opinion. The Conference has a particular interest in protecting editorial expression on the political process.

The National Newspaper Association is a national trade association representing the interests of weekly and daily newspapers throughout the country. Founded in 1885 and with more than 5,000 members, NNA is the oldest and largest national trade association in the newspaper industry. For over a century, a prime concern of NNA has been to ensure that political debate in this country be conducted in an open and robust manner.

The Newsletter Association is the international trade association representing 850 publishers of newsletters and specialized information services. NA has a longstanding commitment to the free exchange of information and opinion through the written word as protected by the First Amendment.

The Radio-Television News Directors Association is a professional association of electronic journalists. The Association has more than 2,500 members who gather, edit, and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every recent Supreme Court case involving the First Amendment rights of reporters to gather and disseminate news and information. It has provided representation, information, legal guidance, or research in virtually every major press freedoms case litigated since 1970.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.